



FEDERALLY SPEAKING



by Barry J. Lipson

Number 47

Welcome to *Federally Speaking*, an editorial column for **ALL** interested in the **Federal Scene**, originally compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening in the Federal arena, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a “heads ups” to Federal CLE opportunities, or other Federal legal and related occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 47th column in this series, and together with prior columns is available on the website of the U.S. District Court for the Western District of Pennsylvania: <http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm>.

LIBERTY’S CORNER

The Honorable Sandra Day O’Connor

“*Where law ends, tyranny begins,*” so proclaimed then United States Supreme Court Justice Sandra Day O’Connor, on September 21, 2001, just ten days after 9/11, before over 1000 members of the Pittsburgh legal community, on the occasion of your columnist having the honor of “pinning her Honor” before this packed house of well-wishers. This view has again been reiterated by her in an apparently non-transcribed post-Supreme Court Georgetown University speech on March 10, 2006, where, following the New Year’s Day 2004 lead of then sitting Conservative Republican U.S Supreme Court Chief Justice William Rehnquist who “bawled out Congress for enacting Sentencing Guidelines which impinged on judicial independence and could ‘intimidate individual judges’” (see *Federally Speaking*, Numbers 36 & 44), she cautioned against current trends that “challenge the independence of judges and the freedoms of all Americans” which could lead to a dictatorship here in the good ‘ole U.S. of A. But more on this later.

The pin was the recognition pin of the Federal Bar Association (FBA), the place was the Duquesne University Student Union Ballroom, the quote was from Margaret Thatcher, former British Prime Minister, and the occasion was the awarding of Justice O’Connor the FBA Western Pennsylvania Chapter “Carol Los Mansmann Award for Distinguished Public Service,” by yours truly, as FBA West Penn Chapter Charter President and National FBA Third Circuit Vice President. “She was driving home the point that in light of the [then very] recent terrorist attacks *the rule of law must be maintained*. ‘The need for lawyers does not diminish in times of crisis,’ she stressed, ‘it only increases’.” This Award was presented to Justice O’Connor as recognition of her having “made unique and outstanding contributions to the legal profession through diligence, dedication to principle, and commitment to the profession’s highest standards.’ Attributes exemplified by U.S. Court of Appeals Third Circuit Judge Carol Los Mansmann.” (See *Federally Speaking*, Number 9.) As a dividend from this memorable event, Justice

O'Connor also agreed to serve as an Honorary FBA West Penn Chapter Advisory Council Member, a position she still holds.

The Justice had come to Pittsburgh at the invitation of Duquesne University School of Law to commemorate the 20th anniversary of her appointment to the United States Supreme Court. Just the year before, in *Stenberg v. Carhart*, 530 US 914 (2000), she had joined with the majority to strike down the Nebraska "Partial Birth Abortion" Statute, as it did not contain an exception to preserve the health of the mother, and as it was written broadly enough to also encompass more traditional abortion methods. This may have caused some discomfiture with her host University, though she had written a concurring opinion expressing her view that if the statute had a health of the mother exception and applied only to the "dilation and extraction" procedure commonly referred to as "partial birth abortion," it could have passed constitutional muster. But if it did cause such a sense of discomfiture in her host, no one could tell. And, in light of South Dakota's very recent adoption of a far-reaching ban on abortion, which sets the stage for a new legal challenge to *Roe v. Wade*, 410 US 113 (1973), the U.S. Supreme Court will probably be re-visiting the broader question of abortion, and this time without the "daylight" shined on the subject by the Honorable Sandra Day O'Connor.

On September 26, 1981, Sandra Day O'Connor became the 102nd U.S. Supreme Court Justice and the first woman to sit on that Court, where she conscientiously served until her resignation became effective on or about January 31, 2006. According to Thomson Gale, E-Research and Educational Publisher, President Ronald Reagan "chose O'Connor probably because of her conservative credentials, her strict constructionist views of the Constitution, and her ability to elicit widespread support. ... During O'Connor's first year on the Court, she made it clear that she was a conservative. She joined conservatives Burger and Rehnquist on sixty-two out of eight-four opinions and opposed those two conservative allies only five times. Her votes paralleled those of fellow Arizonan Rehnquist even more closely. Out of 137 cases, she voted 123 times with Rehnquist. ... She was [at least at that time] rarely accused of creatively reading into a law what was not explicitly there."

But then the "**Middlizer**," the *great equalizer* of modern times, seems to have asserted itself in the positions she took on the Court. Over her nearly quarter of a century tenure on the Court, while articulating a serious concern for the importance of precedent, she was often the "swing vote" (not her favorite designation), writing many important and sometimes controversial opinions, at times tending towards the right, at times tending towards the left, and at times "**middlizing**" as in the *Carhart Abortion Case*, above, and as in *Lynch v. Donnelly*, 465 U.S. 668 (1984), permitting nativity scenes in public places provided there is no governmental endorsement of religion. (In the Pittsburgh Creche Case of *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), which held that the creche displayed in a public building gave the appearance of governmental endorsement of religion and therefore violated the *Constitution's Establishment Clause*, O'Connor voted with the majority in part and concurred with the majority in part.) As summed up by Charles Haynes, Senior Scholar at the First Amendment Center: "On religious-liberty issues, Justice Sandra Day O'Connor was more than just the swing vote — *she was a voice of reason and moderation* during a time when extremes often dominate the debate. She will be sorely missed." Emphasis added.

"*The Great Middlizer*, the saving grace of our Democracy, our Republic. Not the force that creates the great 'middle class,' but that seemingly irresistible force that tends to mitigate extremes in the Presidency and the Judiciary, whether they be Democrat or Republican controlled, and propels those occupying such positions towards the *middle of the road*." Thus, "Republican President Dwight Eisenhower was disappointed when his conservative Supreme Court appointee Chief Justice Earl Warren 'proved to be an unabashed liberal'. ... A more recent example is Republican President George Herbert Walker Bush's appointment of Justice David Souter who began voting with the liberal faction

‘on the Court within a short time, and even sided against his sponsor's son in *Bush v. Gore* [531 U.S. 98] in 2000’ [while O’Connor voted for Bush]. ... According to Larry J. Sabato, Director of the University of Virginia Center for Politics, *‘about a quarter of confirmed nominees in the last half-century, ends up evolving from conservative to moderate or liberal. These evolutions take many years, sometimes decades, but they are undeniably a part of the Court's history.’*.... Why? Sabato speculates, ‘lifetime tenure with no retirement age means total independence from effective pressure of any kind. The ‘reward system’ *on* the Court is very different from the system prevailing in a nomination battle. During the nomination phase, strict adherence to the ideology of your side--at least in appearances--is essential. Once the black robes are donned, the approval of society's elites, including editorial and academic praise, is highly prized by most Justices’.” (Emphasis added. See *Federally Speaking*, Number 45.)

And now to Justice O’Connor’s warning, given from the perspective of a very recent U.S Supreme Court Retiree, of the potential threat of the replacement domestically of democracy by dictatorship. First, in the lead-in to this first-hand National Public Radio [NPR] Report by NPR’s Legal Affairs Correspondent Nina Totenberg of O’Connor’s Georgetown speech, we are advised that “Supreme Court Justices keep many opinions private but Sandra Day O’Connor no longer faces that obligation. Yesterday [March 9, 2006], the retired Justice criticized Republicans who criticized the courts. *She said they challenge the independence of judges and the freedoms of all Americans.*” Totenberg then shares with us her exclusive notes of this important Georgetown University speech of retired Justice O’Connor, the only available “fourth estate” or “official” source we have (as “no transcript or recording of the speech has been made available” as of yet): “In an unusually forceful and forthright speech, O’Connor said that *attacks on the judiciary by some Republican leaders pose a direct threat to our constitutional freedoms.* O’Connor began by conceding that courts do have the power to make Presidents or the Congress or Governors, as she put it ‘really, really angry.’ But, she continued, if we don’t make them mad some of the time we probably aren’t doing our jobs as judges, and our effectiveness, she said, is premised on the notion that we won’t be subject to retaliation for our judicial acts.” Then, relying on “founding intent,” she stressed that the “nation’s founders wrote repeatedly ... that *without an independent judiciary to protect individual rights from the other branches of government those rights and privileges would amount to nothing.* But, said O’Connor, as the founding fathers knew statutes and constitutions don’t protect judicial independence, people do.” (Emphasis added.)

Totenberg continued: “And then she took aim at former House GOP leader Tom DeLay. She didn’t name him, but she quoted his attacks on the courts at a meeting of the conservative Christian group Justice Sunday last year when DeLay took out after the courts for rulings on abortions, prayer and the Terri Schiavo case. This, said O’Connor, was after the federal courts had applied Congress’ onetime only statute about Schiavo as it was written. Not, said O’Connor, as the Congressman might have wished it were written. This response *to this flagrant display of judicial restraint*, said O’Connor, her voice dripping with sarcasm, was that the Congressman blasted the courts” (emphasis added). And remember here that the knee-jerk Conservative demands are traditionally strict construction, no Legislation by the Judiciary, and, oh yes, “founding intent.” Here we are told the Court was now contrarily being castigated for applying the words and not the alleged spirit of the Schiavo Statute. Shades of the refusal of the same group to allow an up or down vote on President Bush’s Supreme Court nominee Harriet Miers after asserting time after time the right’s “God-given” right thereto.

“It gets worse,” Totenberg reported O’Connor stated, then “noting that death threats against judges are increasing. It doesn’t help, she said, when a high-profile Senator suggests there may be a connection between violence against judges and decisions that the Senator disagrees with. She didn’t name him, but it was Texas [U.S] Senator John Cornyn who made that statement, after a Georgia judge

was murdered in the courtroom and the family of a federal judge in Illinois murdered in the judge's home. O'Connor observed that there have been a lot of suggestions lately for so-called judicial reforms, recommendations for the massive impeachment of judges, stripping the courts of jurisdiction and cutting judicial budgets to punish offending judges. Any of these might be debatable, she said, *as long as they are not retaliation for decisions that political leaders disagree with.*" Emphasis added.

Finally, Nina Totenberg reported that the former Justice concluded with her "dictatorship" caution: "I am against judicial reforms driven by nakedly partisan reasoning." Then "[p]ointing to the experiences of developing countries and former communist countries where interference with an independent judiciary has allowed dictatorship to flourish, O'Connor said *we must be ever-vigilant against those who would strong-arm the judiciary into adopting their preferred policies.* It takes a lot of degeneration [the "process of declining from a higher to a lower level of effective power or vitality or essential quality"] before a country falls into *dictatorship*, she said, but we should avoid these ends by avoiding these beginnings." (Emphasis added.)

On various blogs, not only have some (presumably on the far left) found it surprising that this warning comes from "a Republican and a Reagan nominee," and the "swing vote" who "swung the presidential election to George Bush in 2000;" but also "that O'Connor's speech to an audience of lawyers at Georgetown University was attended by just one reporter, the diligent legal correspondent for National Public Radio, Nina Totenberg," and that: "No transcript or recording of the speech has been made available.... It's unsurprising that, say, Colin Powell chooses to leak rather than speak out," one blog observes, "but when a Supreme Court Justice prefers to whisper her fears to a coterie audience, it's hard to avoid the inference that the whisper itself speaks volumes about the imperilled democracy it purports to describe.... The possibility that America is sliding toward dictatorship or an unprecedented form of corporate oligarchy ought to be a matter of world concern." Though, it appears conversely that Justice O'Connor is at the forefront of alerting the country to this concern, not only at Georgetown, but at whatever forums that are and/or become available to her.

The Honorable Sandra Day O'Connor, thus, continues to exemplify the attributes that earned her the "Carol Los Mansmann Award for Distinguished Public Service," and continues, even in retirement, to make "unique and outstanding contributions to the legal profession through diligence, dedication to principle, and commitment to the profession's highest standards," as clearly exhibited by her efforts to preserve Judicial independence and our Democracy. It is an honor to have Your Honor as an Honorary and honorable member of our FBA West Penn Advisory Council and even after leaving the High Court Bench, as a defender of our Constitution and our very way of life. Thank you for keeping us focused on that: "*Where law ends, tyranny begins!*"

This Column is dedicated to the preservation of the U.S. Constitution & the Bill of Rights.

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